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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-983

DAVID M. LIGHTMAN,

Petitioner.

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Petitioner, David M. Lightman, respectfully prays at a writ of certiorari issue to review the judgment and pinion of the Court of Appeals of Maryland entered in is proceeding on October 17, 1972.

OPINION BELOW

The per curiam order and opinion of the Court of Appeals Maryland, reported at 266 Md. 550 (advance report, /1/72), and the opinion of the Court of Special Appeals dopted by the Court of Appeals of Maryland at 266 Md. 0), reported at 15 Md. App. 713 (1972), appear in the ppendix hereto.

JURISDICTION

The judgment of the Court of Appeals of Maryland was ntered October 17, 1972, and this petition for certiorari

was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether the First Amendment permits the punishment by contempt of a newspaper reporter who refuses to disclose information or sources thereof to a Grand Jury where evidence supports the conclusion that the Grand Jury investigation constitutes official harassment of the press.

STATEMENT OF THE CASE

A. *Factual Background*

The Petitioner, Lightman, a reporter for the Baltimore Evening Sun, was summoned to testify before the Worcester County, Maryland, Grand Jury after the publication of a series of articles by him dealing with young people in Ocean City, Maryland. One such article, entitled "Ocean City: Where the Drugs Are?" described an unnamed pipe shop in Ocean City and quoted the unnamed operator of the shop as having asked a potential customer (i.e., Lightman) if he would like to "draw some grass" to illustrate the uses of the pipes in the shop. The offer was made while a uniformed Ocean City policeman was standing in another part of the shop, and when Lightman expressed concern, the shopkeeper replied, "Don't worry about him. We have a lot of cops come in. You know, it's rough for them, most are under 21. We're nice to 'em, so they don't come sniffing around." Lightman (who declined the offer) went on to utilize the shopkeeper as the source not only of other information in the article containing the quotation about drawing grass but also of information in another article in the series, "New Religions Appear on Boardwalk."

Lightman answered certain questions put to him by the State's Attorney for Worcester County, including those that

sought merely to identify the policeman mentioned in the article. He testified he had not observed anyone using or distributing marijuana in the pipe shop. But Lightman refused to answer questions seeking to identify the precise location of the shop and the identity of the shopkeeper on the grounds that such disclosure would (a) inevitably lead to identifying a person who qualified as a "source of any news or information," whose identity could be withheld under Article 35, Section 2, Annotated Code of Maryland and (b) violate the free speech and free press guarantees of the Maryland and United States constitutions.

The State's Attorney instituted civil contempt proceedings in the Circuit Court for Worcester County. At a hearing, substantial evidence was introduced to support Lightman's position that the purpose in questioning him was to harass the press for publishing material that at least implicitly criticized law enforcement in Ocean City and Worcester County. The police chief testified that he did not know whether any of his men had been questioned in an effort to determine the location of the shop or the identity of the policeman. He acknowledged that he had taken no steps "whatsoever" (T. 15)[1] to ascertain the number or location of shops that would meet the description of the one mentioned in the article.

The State's Attorney, in questioning the Managing Editor of the Evening Sun (T. 37-40), pointedly suggested that the paper had never published articles "praising the Ocean City police" (T. 39). Furthermore, the State's Attorney himself testified at length (T. 57-62) about his lack of

[1] The record contains two transcripts, one of a preliminary hearing in the chambers of the Circuit Court judge on August 9, 1971 (reference thereto being indicated herein by "Tr. "), the other of the trial in open court on September 24, 1971 (referenec thereto being indicated herein by "T. ").

respect for the Evening Sun and other papers published by the Evening Sun's publisher, and implied a resentment of criticism from that source.

On the day on which Lightman had been summoned to testify, the State's Attorney told Lightman's counsel that he already knew the identity of the pipe shop, implying that the testimony was not needed for bona fide law enforcement purposes. However, at the hearing, although acknowledging that "I might have told you that" (T. 62), the State's Attorney changed his story and testified that law enforcement officials did not know the location of the shop (T. 61).

The hearing judge did not regard it as pertinent whether law enforcement officers could have discovered the location of the shop and the identity of the shopkeeper without Lightman's testimony (T. 21). The court ordered Lightman held in contempt until he answered the questions, holding among other things that Lightman himself, by personal observation, had been the "source" of the information sought by the Grand Jury and that the shopkeeper, although she verbally supplied certain information quoted in the articles prepared by Lightman, was not a source but instead constituted part of the information obtained by Lightman. This finding was upheld by the Court of Special Appeals, which affirmed the judgment, concluding that Article 35, Section 2, did not shield Lightman from being forced to disclose the location of the shop and to describe or identify persons he had observed, including the shopkeeper.

Additionally the Court of Special Appeals, in considering whether compulsory disclosure of the information sought by the Grand Jury would violate the free speech and free press guarantees, relied upon *Branzburg v. Hayes*, 408 U.S. 665 (1972), as authority for the proposition that no viola-

tion of such Federal constitutional guarantees exists "where sources of information may only be ascertained through observation of those who might become sources while engaged in illegal drug practices. . . ." 15 Md. App. at 726. Neither the hearing judge nor the Court of Special Appeals made reference in any way to the Petitioner's argument that the proceeding constituted an effort by local law enforcement officials to harass, intimidate or punish an unfriendly press.

The Maryland Court of Appeals granted certiorari, and without offering an opportunity to brief or argue the case, summarily determined that no error of law appeared in the decision of the Court of Special Appeals, adopted that court's opinion as its own, and affirmed the judgment.

B. *How Federal Question Is Presented*

On the day upon which Lightman was summoned to appear before the Grand Jury, counsel for the Petitioner, at a preliminary hearing in the chambers of the hearing judge, asserted the "Constitutional right of free press" (Tr. 7) as a basis for refusing to answer the questions. Thereafter, two contempt petitions were served upon Lightman (the second was filed simply to avoid the possibility that the issues might become moot), and were denominated as Cases No. 5406 and 5422 on the Civil Docket of the Circuit Court for Worcester County. The Petitioner asserted in Paragraph 13 of his answer to the petition in Case No. 5406 and in Paragraph 9 of the answer to the petition in Case No. 5422 that disclosure of the information sought would violate his constitutional rights under the freedom of speech and freedom of press guarantees of the United States Constitution. At the hearing, the court (at T. 64-69) read a stipulation in which Lightman based his refusal to

answer certain of the questions, among other reasons, on "my constitutional rights under the freedom of speech and freedom of press guarantees of the Federal and Maryland constitutions" (T. 66).

REASONS FOR GRANTING THE WRIT

A REPORTER MAY WITHHOLD INFORMATION AND SOURCES THEREOF FROM A GRAND JURY WHOSE PURPOSE IS TO HARASS AN UNFRIENDLY PRESS.

Since this Court's decision in *Branzburg v. Hayes, supra,* there has been an increasing number of actions against journalists for refusing to disclose their sources of information. This case gives the Court the opportunity to consider the scope of *Branzburg* in view of the atmosphere to which that case has unquestionably contributed and in view of the Court's assurances that journalists are still entitled to constitutional protection with respect to the gathering of news or in safeguarding their sources.

"Abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms." *Watkins v. U.S.*, 354 U.S. 178, 197 (1957). Within the last year the use of the investigative process to compel disclosures by unwilling journalists has grown steadily more perceptible. At least three journalists have gone to jail for refusing to disclose information or its sources.[2] They are:

(a) Peter J. Bridge, a former Newark News reporter who was jailed for three weeks after he refused to answer

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[2] Among the many accounts dealing with post-*Branzburg* efforts to turn journalists into an investigative arm of government and of party litigants are Hume, "A Chilling Effect on the Press," The New York Times Magazine, 12/17/72, p. 13, and Landau, "Harassing the Press," (More) A Journalism Review, December 1972, p. 8. For an account of the jailing of John F. Lawrence of the Los Angeles Times, see The New York Times, 12/20/72, p. 1, col. 2-3.

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questions in connection with an article he had written about official corruption;

(b) William T. Farr, a Los Angeles reporter who has been in prison since November 27, 1972, for refusing to tell the trial judge in a sensational murder case the name of an attorney from whom he had obtained a statement of a witness in the case;

(c) John F. Lawrence, Washington Bureau Chief of the Los Angeles Times, who was briefly jailed when he refused to deliver tapes of interviews with a Government witness in a criminal case dealing with the Watergate political espionage affair.

Of course the foregoing three examples, and the proliferating number of similar cases, must be dealt with in their own contexts (as to which see, e.g., *Farr v. Los Angeles City Superior Court*, 22 Cal. App. 3d 60 (1972), cert. denied 11/13/72, No. 71-1642), and this petition cannot purport to consider them on their merits. They are catalogued here, however, because they clearly illustrate the aggressive turn that governmental insistence on annexing investigative journalism has taken since *Branzburg v. Hayes*. These events have occurred in spite of the carefully worded passages in the Court's opinion and the concurring opinion in *Branzburg* emphasizing the limited nature of the holding of that case. To say the least, the Court of Special Appeals of Maryland overstated the *Branzburg* holding.

"When First Amendment interests are at stake, the Government must use a scapel, not an ax," *Bursey v. U.S.*, 406 F.2d 1059, 1088 (C.A. 9, 1972). The Worcester County State's Attorney has attempted to use an ax on David Lightman. The record is replete with evidence that sug-

gests the situation is one in which governmental power has been crashed down upon an apparently unfriendly commentator. The questionable behavior of the State's Attorney, in first saying he knew the location of the shop and then changing his story at the hearing, coupled with his acknowledged lack of respect toward the Evening Sun and with the criticism of Ocean City law enforcement implicit in Lightman's article, furnish sufficient facts for a finding that the Grand Jury was used to punish and intimidate a critical press rather than to develop necessary information about criminal activities. This is particularly so where the pipe shop was known to be in a certain part of Ocean City and where a reasonably thorough police investigation should have located the shop without forcing a newspaper reporter to reveal his sources of information.

Highlighting the punitive rather than investigative nature of the summons to Lightman, his articles about Ocean City (in the record as exhibits to the original contempt petition) adverted to other possible violations of criminal law besides the supposed possession by the shopkeeper of marijuana, including observations of use of drugs in public and an interview with a former drug dealer. As to any such other possible crimes, no questions were proposed to be put to Lightman. Hence, the only questions asked or to be asked of him related to the one incident in which the articles implicitly criticized the law enforcement officials by suggesting that a criminal act was going on under the nose of a policeman.

One of the most important functions a free press performs in our society is to serve as a watchdog on such official institutions as the police. Courts, therefore, should be especially insistent upon safeguarding free speech and free press guarantees where, as here, the reporter's source

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and the information related to the effectiveness of how law enforcement officials were doing their job.

Where a constitutional right is involved, as here, there is a duty on the reviewing court to assess the record and make an independent determination of whether a constitutional protection has been violated.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Maryland.

Respectfully submitted,

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APPENDIX

In The Court Of Appeals Of Maryland

Misc. Docket No. 205 (Criminal)

September Term, 1972
(No. 593 — September Term, 1971
Court of Special Appeals)

David M. Lightman

v.

State of Maryland

ORDER

Upon consideration of the petition for writ of certiorari to the Court of Special Appeals of Maryland, it is this 17th day of October, 1972,

ORDERED by the Court of Appeals of Maryland that the writ of certiorari to the Court of Special Appeals shall issue and said case shall be transferred to the regular docket as No. 233, September Term, 1972.

Chief Judge Robert C. Murphy did not take part in this matter.

/s/ WILLIAM J. McWILLIAMS,

Judge.

PER CURIAM:

This Court, having granted a writ of certiorari and in accordance with Maryland Rule 811b having determined that no error of law appears in the decision, adopts the opinion of Chief Judge Murphy for the Court of Special

Appeals in *Lightman v. State*, 15 Md. App. 713, and affirms the judgment of the Court of Special Appeals.

Judgment Affirmed, With Costs.

In The Court Of Special Appeals

[No. 593, September Term, 1971]

Decided August 4, 1972

MURPHY, C.J., delivered the opinion of the Court:

Appellant, a newspaper reporter for the Baltimore Evening Sun, was summoned before the Grand Jury of Worcester County on August 9, 1971 to testify with respect to his knowledge of suspected illegal drug traffic in Ocean City, Maryland. Earlier, on July 26, 1971, appellant had published an article in The Evening Sun under his byline which was entitled "Ocean City: Where the Drugs Are?"; it was the product of a special assignment given him by his editors to investigate the activities of young people at Ocean City, particularly those relating to the use and selling of drugs.[1] The article described an incident occurring in a pipe shop located near the lower end of the Boardwalk. It read, in part:

> "A shop near the lower end of the Boardwalk wants to be sure its customers are satisfied with the pipes they buy. So salesmen sometimes let them draw some marijuana before they make a purchase.
>
> "The shop has pipes for all purposes — combination pipes, with bowls for opium, tea and hash; adjustable pipes for smoking pot with and without water; buckle pipes, which clip on to one's belt buckle (and are thus easily camouflaged), and others.
>
> "Last Friday night, a uniformed Ocean City policeman was standing in another part of the shop. The

[1] Two other articles were published in The Evening Sun as a result of appellant's assignment: (1) "Teens Play at Panhandling," published on July 20, 1971, and (2) "New Religions Appear on Boardwalk," published on July 26, 1971.

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shopkeeper, her legs stretched out on a water bed in the next room, tried to explain uses of the various pipes to a customer.

"The shopkeeper asked him if he would like to 'draw some grass.' He pointed to the officer.

" 'Don't worry about him. We have a lot of cops come in. You know, it's rough for them, most are under 21. We're nice to 'em, so they don't come sniffing around.' The customer declined the offer.

"Wherever young, long-haired, freaky-looking people are gathering, policemen seem to be watching them in Ocean City. The police are usually about the same age as the hangers-on.

* * * * * *

"The woman in the pipe store for example is 22. 'I don't think grass will hurt you, so I sell this head stuff. And I smoke cigarettes because I figure they hurt you until you're older.

" 'But these other drugs just aren't worth it. After you've turned on to acid or coke a few times, you realize how temporary it is.'

"She says she does not use any drugs herself."

The Grand Jury asked appellant, based on his personal observation, to state the location of the pipe shop referred to in his article, and provide it with a description of the shopkeeper. Appellant refused to answer, claiming that the shopkeeper was the source for his article; that disclosure of the information sought by the Grand Jury would, with a high degree of probability, lead to the actual disclosure of his source of information; that by the express provisions of Maryland Code, Article 35, Section 2, he could not, as a newspaperman, "be compelled to disclose, in any legal proceeding or trial * * * the source of any news or information procured or obtained by him for and published in the newspaper * * *"; and, further, that under the federal and state constitutional guarantees of freedom of

speech and press, he possessed a right, as a newspaperman, not to answer the Grand Jury's inquiries.

The State's Attorney promptly instituted constructive contempt proceedings against appellant; he maintained that the information sought by the Grand Jury from appellant was not of his source of news, but involved information based on appellant's personal knowledge obtained by him "solely upon his personal observations." At the hearing on the contempt charge, appellant testified that he was twenty-one years old; that he had been sent by his editors to Ocean City "to obtain a story on how open drug use and sales were in Ocean City"; that his editors had indicated that they had heard rumors that drugs were being used and sold openly on the Boardwalk and anyone "with my length of hair" and of his age, or younger, could obtain drugs simply by being friendly enough with the right people. Pursuant to these instructions, appellant testified that he went to Ocean City where he mingled with people of his own age group, walked around and entered shops; and that his investigative efforts ultimately led him in July of 1971 to the shop and shopkeeper referred to in his article. He testified that he had spoken with the shopkeeper and that she had given him the information published in his article. He stated that he had been told by his editors that he could reveal his identity as a reporter or not, as he wished; and that "at times" he gave away his identity. It was stipulated that appellant was the "customer" referred to in his article who had the conversation with the shopkeeper.

In finding appellant's refusal to answer the Grand Jury's inquiry to constitute a civil contempt, the court noted that there had been no testimony that he did in fact identify himself to the shopkeeper as a newspaper reporter. The court also found that there had been no testimony that the shopkeeper gave appellant any information based upon the representation or knowledge that he was a newspaperman. The court concluded that the shopkeeper was not a "source" of information for appellant's article within the meaning of Article 35, Section 2; that appellant was a stranger to the

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shopkeeper and what he heard was not conveyed to him in confidence. The court also concluded that appellant's constitutional rights of free speech and press would not be violated by requiring that he provide the Grand Jury with the information it sought. This appeal followed.

I.

The Newsman's Statutory Privilege of Non-Disclosure of Sources of News Obtained for Publication.

No privilege was afforded newsmen at common law to conceal from judicial inquiry either the source of their information or the information itself. *Garland v. Torre*, 259 F.2d 545 (2d Cir.); *Branzburg v. Pound*, 461 S.W.2d 345 (Ky.); *Beecroft v. Point Pleasant Printing & Pub. Co.*, 197 A.2d 416 (N.J.); *State v. Donovan*, 30 A.2d 421 (N.J.); *People v. Sheriff of New York County*, 199 N.E. 415 (N.Y.); Annotation, 7 A.L.R.3d 591; 3 *Jones on Evidence*, Section 854. Maryland, in 1896, was the first state to enact a statute changing the common law to give a newspaperman the privilege of not revealing the source of information published by him.[2] *State v. Sheridan*, 248 Md. 320, 322. Now codified as Section 2 of Article 35, the statute in its present form provides:

> "No person engaged in, connected with or employed on a newspaper or journal or for any radio or television station shall be compelled to disclose, in any legal proceeding or trial or before any committee of the legislature or elsewhere, the source of any news or information procured or obtained by him for and published

[2] The statute was passed in apparent response to the jailing, in early 1896, of a newspaper reporter who had obtained information which enabled him to accurately report the proceedings of the Baltimore City Grand Jury. Summoned before the Grand Jury, and asked to reveal the source of his information, the reporter declined on the ground that a newspaperman "never betrays those who give him their confidence." The reporter remained in jail for five days; he was released when the term of the Grand Jury expired. See 36 Va. L. Rev. 61; Editor & Publisher, September 1, 1934, p. 9; Baltimore Morning Sun, June 24, 1972.

in the newspaper or disseminated by the radio or television station on and in which he is engaged, connected with or employed."[3]

In *State v. Sheridan, supra*, a newsman refused to reveal to the Grand Jury the details of a conversation between him and one Patrick relating to certain suspected irregularities, even though the substance of the conversation had previously been disseminated to the public and Patrick revealed as its source. The lower court held that under the Maryland statute the newsman could not be compelled to answer the Grand Jury's inquiries; that his newspaperman's privilege "of never violating a confidence allowed him to remain silent as to the details of the information Patrick had given him." While the Court of Appeals dismissed the appeal to it from that ruling on grounds of mootness (the Grand Jury's term having expired), it characterized the lower court's conclusion as inexplicable "since the statute makes inviolate only 'the source of any news or information' and not the 'news and information' itself." At page 322. The court in *Sheridan* criticized the holding of the Supreme Court of Pennsylvania in the case of *In Re Taylor*, 193 A.2d 181, involving a newsman's privilege statute which, like the Maryland statute, protected newsmen from disclosing "the source of any [published] information." In *Taylor* the court concluded, in effect, that the phrase "source of any information," as used in the statute, included not only the identity of a person, but also the information itself. The *Sheridan* court indicated at page 322 that the *Taylor* court "failed to discriminate on the facts and the law between the *source* of the information and the *information*"; it referred to 77 Harv. L. Rev. 556, where the author, expressing a belief that the court in *Taylor* blurred the distinction between the words "source" and "information," as used in the statute, said (p. 557):

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[3] As originally enacted by Chapter 249 of the Acts of 1896, the privilege did not cover persons engaged in radio or television news broadcasting; they were, however, afforded the privilege by Chapter 614 of the Acts of 1949.

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> "* * * To ask someone for information as such is to ask what, substantively, he knows about a certain problem; to ask someone for the 'source' of his information is, in effect, to ask how he knows. The reasons for making the answer to the latter inquiry privileged do not necessitate making the answer to the former privilege as well. * * *"

In its opinion in *Sheridan*, the court also referred to 112 U. Pa. L. Rev. 438, where the author, in criticizing the *Taylor* decision, observed that newsman's privilege statutes, like those in force in Maryland and Pennsylvania, merely provide that a newsman cannot be forced to divulge his *sources;* that when it granted the "newsman privilege" the legislature was concerned with the usual case in which an informant makes disclosures under the stipulation that his identity remain unknown; and that unlike other privileged communication statutes, the newsman's privilege statute has as its primary focus the protection of the identity of the informant and not the information itself.

In *State v. Donovan*, 30 A.2d 421 (N.J.), referred to in *Sheridan* as a decision to be contrasted with *Taylor*, a newsman declined to answer a question propounded to him in a judicial inquiry relating to news articles he had published on the ground that he was protected from such inquiry by a newsman's privilege statute, the provisions of which, in all material respects, are identical to those in the Maryland statute. The court there noted that the source of the news articles was already known to the public; that the newsman's privilege statute, being in derogation of the common law, was strictly to be construed; that the statute, in terms, protected newsmen only from being compelled to disclose "the source of any information [published] in the newspaper"; and that since the source was known, the newsman could be compelled to answer a question which "did not go to the source of the publication."[4] At p. 426.

[4] The question sought to elicit from the newsman the means by which the source of the information conveyed releases for publication to the newspaper.

Branzburg v. Pound, 461 S.W.2d 345 (Ky.),[5] involved a newsman's privilege statute in all material respects identical to the Maryland statute. In that case, a newspaper reporter wrote an article describing in detail his observations of two young persons synthesizing hashish from marihuana. The article stated that the reporter had promised not to reveal the identity of the two hashish makers. Summoned before the Grand Jury, Branzburg was asked to identify the persons about whom he wrote and those in possession of and compounding marihuana; he refused and was held in contempt. On appeal, Branzburg contended that "source of information" should be construed to mean all knowledge received by a newsman no matter what the source; and that when a newsman observes something, the thing observed is itself the source of the information. The court, rejecting Branzburg's arguments, concluded that the statute "granting immunity to a newsman from disclosing the *source of any information* procured or obtained by him, grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself." At p. 347. The court said:

> "*Information* as used in the statute refers to the things or the matters which a reporter learns and *source* refers to the method by which or to the person from whom he learns them.
>
> "In this case the reporter learned that two men were engaged in the process of making hashish. Their identity, as well as the activity in which they were engaged, was a part of the *information* obtained by him, but their identity was not the *source* of the information.
>
> "The actual *source* of the information in this case was the reporter's personal observation. In addition some informant may have provided him with information that at a certain time and place he could observe the process of conversion of marijuana into hashish. If such was the case we have no doubt that the identity of the informant was protected by the statute.

[5] Affirmed on other grounds, *Branzburg v. Hayes*, 408 U.S. 665.

"The reporter, however, was not asked to reveal the identity of any such informant and his privilege from making that disclosure is not in question. He was asked to disclose the identity of persons seen by him in the perpetration of a crime and he refused, urging as a justification for such refusal, that the statute should be given a broad construction extending his privilege against disclosure to all his knowledge of this incident rather than just the source of the knowledge.

* * * * * *

"In all likelihood the present case is complicated by the fact that the person who committed the crime were probably the same persons who informed Branzburg that the crime would be, or was being, committed. If so, this is a rare case where informants actually informed against themselves. But in that event the privilege which would have protected disclosure of their identity as *informants* cannot be extended beyond their role as informants to protect their identity in the entirely different role as perpetrators of a crime" (pp. 347-348).

Appellant in the present case characterizes the statement of law in *Sheridan* (properly, we think) as dictum. He suggests that the dictum could not withstand critical examination in a case actually presenting the case for decision. He discounts the force of the holding in *Branzburg* on the ground that the issues were not well considered in that case and, further, because the facts were different from those now before us. He contends that the entire purpose of the Maryland newsman's privilege statute is to permit a reporter to describe acts or words of a source without identifying him. He claims that the statutory privilege is intended to foster publication of such material, and that it is wrong to conclude that anything observed by a reporter must be disclosed on the ground that what he sees is the news itself and not the source. He contends that the information he was seeking in this case — the illegal use of drugs — necessarily involved violations of law; that

his only way to locate a source of information was to keep his eyes open for a violation, then approach the person observed for information and thereby obtain a valuable source for material later to be published; that because the reporter learned of the source's identity by personal observations, and the events reported indicated a violation of the criminal laws, does not permit him to be questioned as to the things observed when, if disclosed, they would lead to the identification of his source. He claims that nothing in the statute protecting against compelled disclosure of "the source of any news or information" requires that the source be a "knowing" one. He suggests that a reporter might locate someone of garrulous disposition possessed of information of importance on an issue of public interest and might make use of many things told him in conversations with such a person, even though the source was altogether unaware that he had been talking to a newspaperman. If, in such circumstances, a reporter could not protect his source from revelation, there would be in many cases, as appellant sees it, a tendency on the part of reporters to write stories derived from such a source in a less direct and less accurate fashion than otherwise would be the case; that the purpose would be to reduce the risk of closing off the source; that any such lessening of accuracy in presentation of the news is to the disadvantage of the public, and the encouragement of a free press, which patently was the basis for the statute's enactment. Appellant acknowledges, on the other hand, that if a reporter chances on an act of violence being perpetrated on the street, he may not claim a newsman's privilege and thereby avoid describing what he saw or decline to identify the perpetrator on the ground that he subsequently described in a newspaper story what he witnessed; in this situation, appellant believes that because the person who committed the act would not have intentionally communicated information to the reporter, the person would not be a "source" and the statute would have no applicability.

The State contends that the statute makes privileged only the source of the newsman's information and does

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not protect the information itself, whether it be obtained from a protected source or through the reporter's personal observation. It contends that appellant's status as a newsman imparted no special stature to his observations because they could have been made by anyone; that he was not permitted to observe the pipe shop knowingly but in confidence by a source; that he was treated as a prospective purchaser and observed what any other customer who happened into the pipe shop would have observed.

The State contends that the purpose of the statute, apparent from its face, is to encourage the flow of news from sources which might otherwise fear the unfavorable publicity or retribution resulting from their revelation as a source of the news story. It argues that the statute protects the confidence of sources in order to encourage greater dissemination of information; that implicit in the statute is the element of confidentiality; that the ends of the statute are not served where the person claimed to be a source is not even aware that he is speaking to a newspaper reporter. The State claims that the shopkeeper in this case is not a source within the meaning of the statute; that the source of the information was the appellant's personal observations; that requiring him to disclose the location of the pipe shop and describe the shopkeeper will in no way inhibit the free flow of information to the press because to the shopkeeper appellant was nothing more than a potential customer and the information she imparted to him was not given under a promise that he would protect her anonymity but was given without compunction or reliance upon a promise of anonymity.

The general principle of privileged communications is based, in part, on the fundamental condition that the communication originate in confidence that it will not be disclosed without the communicant's consent. See 8 Wigmore (McNaughton Rev. 1961) Section 2285. The Maryland statute, however, does not protect against the disclosure of communications; it privileges only the source of the information and the privilege is not that of the informant but of the newsman, as the State concedes. See *Brogan*

v. Passaic Daily News, 123 A.2d 473 (N.J.); *State v. Donovan, supra.* The statute, on its face, does not purport to protect a newsman from disclosing *only* such sources of news or information published by him that was received in the course of a confidential newsman-informant relationship. On the contrary, while the Legislature may have enacted the statute with the primary purpose in mind of protecting the identity of newsmen's confidential sources, we think the statutory privilege broad enough to encompass any source of news or information, without regard to whether the source gave his information in confidence or not.[6] Consequently, it is for the newsman to determine whether he will disclose the "source" of his news or information, and such disclosure cannot be compelled by requiring that he answer questions aimed, directly or indirectly, toward ascertaining the source's identity. But obviously not all news or information published by news-

[6] The strong conviction among newsmen that they must not expose an informant who has given information in confidence has long been recognized. Indeed, it is canon of journalistic ethics to which, it is said, newsmen almost unswervingly adhere that they shall "hold sacred and inviolable all information given * * * in a confidential way." See 36 Va. L. Rev. 61, quoting from Editor and Publisher, September 1, 1934, p. 9. As the author of the law review article points out, the journalistic ethic is based on the proposition that if informers feel that newsmen cannot be trusted to protect a confidence, then valuable sources of information will be closed to news-gathering media. Many law review commentators indicate a belief that newsman privilege statutes are predicated on the existence of a confidential relationship between the reporter and his source of information and that the statutes may be justified on the ground that protection of the confidential relationship benefits the public at large by guaranteeing better news reporting. See 46 Oreg. L. Rev. 99; 11 Stanford L. Rev. 54; 9 Clev. Mar. L. Rev. 311; 58 Calif. L. Rev. 1198; 45 Tulane L. Rev. 605. See also *People v. Wolf*, 329 N.Y.S. 291 (Supreme Court, New York County), involving a broadly worded newsman privilege statute against compelled disclosure of "any news or the source of any such news" where the court held "the element of confidentiality" was implicit in the statute, *viz.*, that to raise the claim of privilege, the newsman was required to show that "the information or its sources must be impaired * * * under a cloak of confidentiality, *i.e.* upon an understanding, express or implied, that the information or its sources will not be disclosed." At p. 297.

men has as its origin a "source" protected by the statute. Where a newsman, by dint of his own investigative efforts, personally observes conduct constituting the commission of criminal activities by persons at a particular location, the newsman, and not the persons observed, is the "source" of the news or information in the sense contemplated by the statute. To conclude otherwise in such circumstances would be to insulate the news itself from disclosure and not merely the source, a result plainly at odds with the Maryland law espoused in dictum in *Sheridan*. We think *Sheridan* correctly interprets the Maryand statute, particularly since, being in derogation of the common law, it requires a strict construction. See *State v. Donovan*, *supra*, and compare *MacBride v. Gulbro, Adm'x*, 247 Md. 727. As in *Branzburg*, the situs of the criminal activity, and the persons participating in it, was in this case part of the information obtained by the appellant through his own personal observations and, consequently, neither the identity of the shopkeeper nor the location of the shop constituted the "source" of the news or information published by the appellant. Had the substance of appellant's information been learned, not by personal observation but been supplied to him by an informant, the identity of that informant would clearly be protected. In the circumstances of this case, that the shopkeeper gave on-the-scene information which revealed her complicity in illegal activities means only that she informed against herself; as in *Branzburg*, that fact cannot be extended to protect her identity as a participant in the illegal activities. We conclude that appellant can lawfully be directed to disclose the location of the pipe shop and describe the identity of all those persons observed by him, including the shopkeeper, who were engaged in the illegal activities; in the posture of this case, these questions do not go to the "source" of the appellant's publication and they must be answered. If the newsman's testimonial privilege is to be broadened, as in New York, to cover disclosure of "any news or the source of any such news" (see *People v. Wolf*, *supra*, footnote 6), it can only be done by the Legislature.

II.

The Alleged Violation of the Constitutional Guarantee of Free Press and Free Speech by Compelling Disclosure of the Newsman's Source.

The appellant contends that where, as here, a newsman is engaged in preparation of a series of articles dealing with illicit use of drugs by young people, and where sources of information may only be ascertained through observation of those who might become sources while engaged in illegal drug practices, it violates the free press and free speech guarantee of the federal and Maryland constitutions to compel a reporter to disclose the identity of a source, some of whose activities he has described in a newpaper article but whose identity he has fully protected. That no such violation of the federal constitutional guarantees exists in such circumstances has now been made clear by the Supreme Court of the United States in *Branzburg v. Hayes, supra* (decided June 29, 1972). We perceive no distinction between the free speech and press guarantees in Article 40 of the Maryland Declaration of Rights and the First Amendment to the federal constitution; they stand in *pari materia, Freedman v. State*, 233 Md. 498. *Cf. Givner v. State*, 210 Md. 484; *Bass v. State*, 182 Md. 496; *Blum v. State*, 94 Md. 375. In the particular circumstances of this case, therefore, appellant's claim to constitutional protection for his source of information is lacking in merit.

Judgment affirmed; appellant to pay costs.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-983

DAVID M. LIGHTMAN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported in 15 Md. App. 713 (1972). The Court of Appeals of Maryland granted a writ of certiorari to the Court of Special Appeals and affirmed. 266 Md. 550 (1972). These opinions are set forth in the Appendix to the Petition.

JURISDICTION

Petitioner asserts this Court's jurisdiction under 28 U.S.C. §1257(3).

QUESTION PRESENTED

When State law protects a newsman's sources but State courts have held that questions directed to Petitioner involved his personal observations revealing criminal activity and not his sources, does the First Amendment grant Petitioner (who never identified himself to those about whom he wrote as a newsman) special status to refuse to answer questions before the Grand Jury by claiming the police could have discovered the information by other means?

STATUTES INVOLVED

Article 35, Section 2 of the Annotated Code of Maryland (1971 Replacement Volume) makes privileged the source of a newsman's information. It provides in pertinent part:

> "No person engaged in, connected with or employed on a newspaper . . . shall be compelled to disclose, in any legal proceeding or trial . . . the *source of any news or information* procured or obtained by him for and published in the newspaper . . on and in which he is engaged, connected with or employed." (Emphasis supplied.)

Petitioner asserts infringement upon his rights under the First Amendment to the United States Constitution.

STATEMENT

In July, 1971, Petitioner, a newspaper reporter on assignment by the Baltimore Evening Sun to look into the drug situation in Ocean City, Maryland, visited a pipe shop in Ocean City (T. 31-32, 49-50;* Stip. ¶¶7(2), 7(4), 7(6), 7(7) and 7(8)). In the course of this assignment sometimes he revealed his identity and sometimes he did not (T. 55).

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* "T" refers to Transcript, September 24, 1971. The Summons of Petitioner has been renewed periodically before successive Grand Jury terms with agreement of counsel that the facts and issues remain the same.

During a visit to the pipe shop Petitioner, in the guise of a prospective customer, observed and participated in the following occurrence as he later reported in his article, "Ocean City: Where The Drugs Are?":

> "The shopkeeper, her legs stretched out on a waterbed in the next room, tried to explain uses of the various pipes to a customer.
>
> "The shopkeeper asked him if he would like to 'draw some grass.' He pointed to the officer.
>
> "Declines Offer
>
> " 'Don't worry about him. We have a lot of cops come in. You know, it's rough for them, most are under 21. We're nice to 'em, so they don't come sniffing around.' The customer declined the offer."
>
> * * * * * *
>
> "The woman in the pipe store for example is 22. 'I don't think grass will hurt you, so I sell this head stuff. And I smoke cigarettes because I figure they hurt you until you're older.
>
> " 'But these other drugs just aren't worth it. After you've turned on to acid or coke a few times, you realize how temporary it is.'
>
> "She says she does not use any drugs herself". (SX-1).

Petitioner was the customer referred to in this excerpt and was the person to whom the statements of the shopkeeper were made (T. 86; Stip. ¶7(9)). There was no testimony that Petitioner identified himself to the shopkeeper as a newspaper reporter or that she gave him any information based upon any such representation (T. 76-77). Apparently, Petitioner was in the Pipe shop solely as a result of his pattern of going in and out of shops, casually talking to people, and mingling with them (T. 79, 50-51). Petitioner also testified that he wrote an article entitled "New Religions

Appear on the Boardwalk" as to which the shopkeeper was of assistance, but nothing in that article suggested any criminal conduct (T. 52, 56, 77; RX-1), and that article was not the subject of any questions by the Grand Jury (Stip. ¶7).

The questions which the State courts held Petitioner must answer were based solely on his personal observations, namely, to describe the shopkeeper and to give the location of the pipe shop (Stip. ¶¶7(8) and 7(11); T. 74-80; Petit., Apx. 23). Petitioner was not asked to reveal the confidential source of any information obtained by him.

The Chief of the Ocean City Police Department testified that there was no possible way for him to determine the location of the pipe shop without obtaining information from a person visiting it, and his lieutenant had been unable to locate it or any other information pertaining to the newspaper article after the Chief had directed him to investigate (T. 10, 13, 15, 19). See also testimony of the State's Attorney that there was no way he could tell the location of the shop from information submitted to him by government officials (T. 61). The trial court accepted this testimony as a matter of fact (T. 28-29).

Petitioner has based his Petition in part upon a factual conclusion contrary to that of the trial court, namely, that there was no reasonably thorough police investigation and that such an investigation would have disclosed the information. Petition, pp. 3, 4, 8. The testimony cited by Petitioner to support his conclusion does not go that far. The Chief of Police testified that he gave his Lieutenant instructions to attempt to identify the number and location of any shops meeting the description in the article, and the Lieutenant came up with negative results. The Chief further stated only that he made no such investigation himself, that he did not specifically ask his Lieutenant to determine how

many shops in Ocean City fit the description, and that his Lieutenant never gave him any indication that he had sought to ascertain how many (T. 15-16). This testimony does not establish that no reasonable investigation was conducted, and does not contradict the trial court's finding, particularly in light of the Chief's testimony that he did direct his Lieutenant to conduct a full investigation (T. 19).

Petitioner also refers to alleged evidence of harassment as the alternative factual basis for his Petition, but the testimony cited fails completely to support such an inference (Petition, pp. 3-4, 8). The complete response of the State's Attorney to defense counsel's question whether he recalled telling defense counsel that he knew the identity of the shop was: "I might have told you that, but I didn't" (E. 61-62). This was the only testimony on this point. Likewise, the acknowledgment (in response to defense counsel's questions) by the State's Attorney, a former State Senator often mentioned in the newspapers, that in his opinion, upon occasion, the Sun papers had wrongly created inferences by innuendo (T. 58-60), and his questioning of the Evening Sun's managing editor about the paper's concern about narcotics enforcement and whether the paper ever complimented Ocean City law enforcement (T. 37-40), simply do not provide a basis for claiming harassment of Petitioner, as a reporter or otherwise.

The State's Attorney explained that he summoned Petitioner to testify after being requested orally and in writing by the Mayor of Ocean City to investigate the observations described in Petitioner's article (SX-2; T. 60-61). He had no other access to the information (T. 10, 19, 61). Acting on such a legitimate request by another governmental official in this single instance certainly does not indicate harassment of Petitioner by the State's Attorney.

ARGUMENT

THERE IS NO IMPORTANT CONSTITUTIONAL QUESTION.

This case is simply not a case which involves disclosure of a newsman's sources. Maryland law protects a newsman's sources. Anno. Code of Md., Art. 35, §2. However, in this case the Maryland courts have carefully considered the facts and have held that the information sought in this case did *not* constitute ". . . the 'source' of the news or information published by the [Petitioner]." Petit., App. pp. 12, 23.

Petitioner has attempted to convey the impression in posing the Question Presented and in stating his Reason for Granting the Writ that Respondent was seeking disclosure of Petitioner's sources of published news, but this is not correct. Respondent is seeking only Petitioner's own personal observations, which revealed illegal activity but were not made in confidence. Rather, they were made by Petitioner posing as a customer in a pipe shop open to the public. Petit., Apx. pp. 13-15, 23.

There is thus not even present in this case the element of confidentiality which was present in *Branzburg v. Hayes*, and *In the Matter of Paul Pappas*, 408 U.S. 665, 92 S. Ct. 2646 (1972).

The opinion of this Court in the *Branzburg*, *Pappas*, and *United States v. Caldwell* cases, *supra*, 408 U.S. 665, is dispositive of this case. In *Branzburg* this Court posed the issue to be decided as follows:

> "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor other constitutional provision protects the average citizen from dis-

> closing to a grand jury information that he has received in confidence. The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them." ..... U.S. at ..... , 92 S. Ct. at 2656.

This Court answered that question as follows by refusing to extend a new constitutional right to newsmen which was not enjoyed by other citizens:

> "Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process." ..... U.S. at ..... , 92 S. Ct. at 2660-2661.

In the instant situation there is far less justification for granting Petitioner newsman a constitutional right to decline to testify because, as previously noted, protection of the confidentiality of a newsman's sources is *not* involved since Petitioner was asked to answer questions before the Grand Jury involving only his personal observations as a member of the public, not identified as a newsman. As stated in *Branzburg*:

> "Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents

no substantial question. The crimes of news sources are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not." ..... U.S. at ....., 92 S. Ct. at 2662.

In rejecting the argument that the State must, before the Grand Jury can summons a reporter, show that the relevant information is not available from other sources, this Court stated, ... U.S. at ....., 92 S. Ct. at 2666-2667:

> "Similar considerations dispose of the reporters' claims that preliminary to requiring their grand jury appearance, the State must show that a crime has been committed and that they possess relevant information not available from other sources, for only the grand jury itself can make this determination. The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. 'When the grand jury is performing its investigatory function into a general problem area, . . . society's interest is best served by a thorough and extensive investigation.' Wood v. Georgia, 370 U.S. 375, 392 (1962). A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' United States v. Stone, 429 F.2d 138, 140 (C.A. 2, 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. . . . *We see no reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determinations.*" (Emphasis supplied.)

Consistently, since the *Branzburg* opinion, this Court has declined to hear other appeals by newsmen who have re-

fused to testify. See *Farr v. Los Angeles County*, 22 Cal. App. 3d 60 (1971), *cert. denied*, No. 71-1642, 41 L.W. 3274 (11/13/72) (Reporter found guilty of contempt for refusing to disclose identity of persons furnishing him with statements allegedly in violation of court order concerning publicity in Manson murder trial since Freedom of Press Clause does not preclude inquiry into reporter's sources allegedly supplied in violation of that order.) *Cf., Bridge v. New Jersey*, 120 N.J. Super. 460, 295 A.2d 3 (1972), *cert. denied*, 72-923, 41 L.W. 3503 (3/19/73).

The issue raised in this Petition, in light of *Branzburg*, thus ultimately becomes whether Petitioner can avoid his duty, shared with all other citizens, to testify before the Grand Jury on the ground that this single instance of summoning him to testify about his personal observations revealing criminal activity constitutes unconstitutional harassment, merely because Petitioner wrote a newspaper article about what he had seen and heard. To ask the question is to answer it. The question is without constitutional substance. If, as this Court held in *Branzburg*, a reporter may be compelled to testify before a Grand Jury in connection with its investigation of criminal activity, then it cannot constitute unconstitutional harassment of the press to compel him to answer the questions put to him about his personal observations.

The mere acknowledgment by the State's Attorney, under questioning by defense counsel, that he did not always agree with everything that was written in the subject newspaper does not establish unconstitutional harassment.

There is simply no evidence that Petitioner had ever been summoned to testify or even questioned previously by any of the officials involved. In any event, the *Branzburg* opinion makes it clear that the Grand Jury does not have to exhaust

all alternative means of obtaining evidence of criminal activity before it can ask a newsman relevant questions because it has wide latitude in conducting its investigations. ..... U.S. at ....., 92 S. Ct. at 2666-2667, *supra*, p. 8. There is simply no indication of harassment in this meager record.

CONCLUSION

Since no important constitutional question has been raised in light of *Branzburg v. Hayes, supra,* and for the other reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

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